# Supreme Court of the United States

OCTOBER TERM, 1968

No. 642

EDWARD BOYKIN, JR., *Petitioner*,

—v.—

ALABAMA, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

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Grand Jury No. 40

THE STATE OF ALABAMA

*vs.*

EDWARD BOYKIN, JR.

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INDICTMENT—Filed June 29, 1966

THE STATE OF ALABAMA ) Circuit Court of Mobile County
MOBILE COUNTY, ) June Session, 1966

The GRAND JURY of said County charge, that, before the finding of this indictment Edward Boykin, Jr., whose name is to the Grand Jury otherwise unknown than as stated, feloniously took three hundred seventy three dollars in lawful currency and coin of the United States of America consisting of one dollar bills, five dollar bills and ten dollar bills, five cent pieces, ten cent pieces, twenty five cent pieces and fifty cent pieces, a more particular description of which is to the Grand Jury otherwise unknown than as stated, the property of Annette Fawcett, from her person and against her will, by; violence to her person or by putting her in such fear as unwillingly to part with the same, against the peace and dignity of the State of Alabama.

CARL M. BOOTH,
District Attorney for the 13th
Judicial Circuit of Alabama
(County of Mobile)

No Prosecutor

A True Bill

OSCAR H. LIPSCOMB.
Foreman of the Grand Jury.

Bail fixed in open court at $2500.00 this the 29th day of June 1966

WILL G. CAFFEY, JR.
Judge.

Presented to the Court by the Foreman of the Grand Jury in the presence of 16 other Grand Jurors
Filed in open court this the 29th day of June 1966.

JOHN E. MANDEVILLE
Clerk, Circuit Court,
Mobile County, Alabama.

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ORDER APPOINTING ATTORNEY—July 11th, 1966

| | | |
|---|---|---|
| State of Alabama | ) | Robbery— |
| Caffey -vs- 15520 | ) | Robbery— |
| 15521 | ) | Robbery— |
| 15522 | ) | Robbery— |
| 15523 | ) | Robbery— |
| 15526 | ) | |
| Edward Boykin, Jr.) | | |
| (Col. Male - Age | ) | |

Defendant being present in court without Counsel, the undersigned Judge, before arraigning defendant proceeds to ascertain, by examination of defendant, the following questions, viz:—

1.—Have you employed and Attorney (Lawyer) or have you made arrangements to be represented assisted and defended by Counsel in this case?

ANSWER—No.

2.—Are you financially able to obtain an Attorney (Lawyer) to represent, assist and defend you in this case?

Answer—No.

3.—Do you desire the Court to appoint an Attorney (Lawyer) to represent, assist and defend you in this case?

ANSWER—No—But Court deems attorney necessary.

It appearing to the satisfaction of the Court that defendant in these cases is Indigent and desires Legal Counsel, it is therefore ordered and adjudged by the Court that Evan Austill, Attorney at Law, be and is hereby appointed as Counsel to represent, assist and defend said Defendant in these cases.

It is further ordered and adjudged by the court that these cases be and the same is hereby re-set for July 14th, 1966, for arraignment.

Thereupon in open court on this day the defendant was served a copy of the indictment.

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ARRAIGNMENT—PLEA GUILTY—REMANDED FOR SENTENCE, ATTORNEY IN COURT—July 14th, 1966

| | |
|---|---|
| State of Alabama ) | Robbery— |
| McCall -vs- 15520 ) | Robbery— |
| 15521 ) | Robbery— |
| 15522 ) | Robbery— |
| 15523 ) | Robbery— |
| 15526 ) | Defendant arraigned and plead guilty— |
| Edward Boykin, Jr. ) | Defendant remanded to Mobile County Jail |
| (Col. Male - Age ) ) | for sentence on September 14th, 1966— |
| ) | Defendant's Attorney, Evan Austill, in |
| ) | court. |

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day being arraigned on the indictment in these cases charging him with the offense of Robbery and plead guilty.

It is therefore ordered and adjudged by the court that the defendant be remanded to the Mobile County Jail for sentence on September 14th, 1966.

Thereupon in open court on this day, Defendant's Attorney, Evan Austill, was in court.

---

VERDICT, JUDGMENT, SENTENCE. ATTORNEY IN COURT—September 20th, 1966

| | |
|---|---|
| State of Alabama ) | Robbery— |
| Gaillard -vs- 15520 ) | Jury and Verdict of, Guilty and Jury fixed |
| Edward Boykin, Jr. ) | punishment at Death by Electrocution—Ad- |
| (Col. Male - Age ) ) | judged guilty—Sentenced to Death by Elec- |
| Rec. Court No. 8416) | trocution—Defendant's Attorney, Evan Au- |
| B.D. 5/25/41 ) | still, in court. |

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day having heretofore on

the 14th day of July, 1966, been arraigned on the indictment in this case charging him with the offense of Robbery and plead guilty and the trial of this case having been regularly set for this day, thereupon in open court on this day in the presence of the District Attorney, Defendant's Attorney and defendant came a jury of good and lawful men, to-wit:—E. J. Strong, Jr. Foreman, and eleven others, who, having been duly empaneled and sworn according to law, who, having heard the evidence and the charge of the court upon their oaths in open court on this day in the presence of the District Attorney, Defendant's Attorney and defendant, do say: "We, the Jury, find the defendant guilty of Robbery, as charged in the indictment, on his plea of guilty, and further find that he shall suffer death by electrocution."

Thereupon in open court on this day the defendant being asked by the court if he had anything to say why the judgment and sentence of the law should not be passed upon him, replied, "he had not;" It is therefore considered and adjudged by the court that the defendant is guilty of the offense of Robbery as charged in the indictment and that the State of Alabama for the use of Mobile County have and recover of the defendant the costs of this prosecution and that the Defendant suffer death by electrocution.

Thereupon in open court on this day, Defendant's Attorney, Evan Austill, was in court.

---

ORDER—SENTENCE SET ASIDE—REMANDED FOR SENTENCE —September 20th, 1966

| | |
|---|---|
| State of Alabama ) | Robbery— |
| Gaillard -vs- 15520 ) | Sentence of the 20th day of September, |
| Edward Boykin, Jr. ) | 1966, set aside—Defendant remanded for |
| (Col. Male - Age ) ) | proper sentencing on September 21st, 1966. |
| Rec. Court No. 8416) | |
| B.D. 5/25/41 ) | |

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper

person and with his attorney, Evan Austill; It is ordered and adjudged by the court that the sentence against the defendant in this case as of the 20th day of September, 1966, be and the same is hereby set aside.

It is further ordered and adjudged by the court that the defendant be remanded to the Mobile County Jail for proper sentencing in this case on September 21st, 1966.

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JUDGMENT, SENTENCE—NOTICE OF APPEAL—SENTENCE SUSPENDED PENDING APPEAL—September 21st, 1966

| | |
|---|---|
| State of Alabama ) | Robbery— |
| Gaillard -vs- 15520 ) | Jury and Verdict of Guilty of Robbery and |
| Edward Boykin, Jr. ) | Jury fixed Punishment At Death By Elec- |
| (Col. Male - Age ) ) | trocution—Adjudged guilty of Robbery— |
| Rec. Court No. 8416) | Sentenced to Death by Electrocution on |
| B.D. 5/25/41 ) | December 16, 1966—Notice of Appeal— |
| ) | Execution of sentence suspended pending |
| ) | Appeal—Defendant ordered transported to |
| ) | Kilby Prison at Montgomery, Alabama, |
| ) | pending appeal. |

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day having heretofore on the 14th day of July, 1966, been arraigned on the indictment in this case charging him with the offense of Robbery and plead guilty and the trial of this case having been regularly set for this day, thereupon in open court on this day in the presence of the District Attorney, Defendant's Attorney and defendant came a Jury of good and lawful men, to-wit:—E. J. Strong, Jr., Foreman, and eleven others, who, having been duly empaneled and sworn according to law, who, having heard the evidence and the charge of the court upon their oaths in open court on this day in the presence of the District Attorney, Defendant's Attorney and defendant do say, "We, the Jury, find the defendant guilty of Robbery, as charged in the indictment, on his plea of guilty, and further find that he shall suffer death by electrocution."

In open court on this day in the presence of the District Attorney, and Defendant's Attorney, Evan Austill, the Defendant Edward Boykin, Jr., being asked by the Court if he had anything to say why the judgment and sentence of the law should not be passed upon him, replied, "he had not;" It is, therefore, considered and adjudged by the Court that you, Edward Boykin, Jr., are guilty of the offense of Robbery as charged in the indictment and that the State of Alabama for the use of Mobile County have and recover of you, Edward Boykin, Jr., the costs of this prosecution and that you, Edward Boykin, Jr., suffer death by electrocution at any time before the hour of sunrise on the 16th day of December, 1966, inside the walls of Kilby Prison at Montgomery, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

It is, therefore, ordered and adjudged by the Court that the Warden of Kilby Prison at Montgomery, Alabama, or in case of his death, disability, or absence his deputy shall at any time before the hour of sunrise on the 16th day of December, 1966, inside the walls of Kilby Prison at Montgomery in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of the said Edward Boykin, Jr., a current of electricity of sufficient intensity to cause his death, and the continuance and application of such current through the body of the said Edward Boykin, Jr. until the said Edward Boykin, Jr. be dead.

And it is further ordered and adjudged by the Court that the Clerk of this Court shall within ten days from this day, the 21st day of September, 1966, issue a warrant under the seal of this court for the execution of the sentence in this case which shall recite the fact of conviction, setting forth specifically the offense, the judgment of the court, the time fixed for the execution of the sentence in this case, directed to the Warden of Kilby Prison at Montgomery commanding him to proceed at the time and place named in the sentence to carry the same into execution, by causing to pass through the body of the said Edward Boykin, Jr., a current of electricity of sufficient intensity to cause death and the application and continu-

ance of such current through the body of the said Edward Boykin, Jr., until said Edward Boykin, Jr. is dead and the Clerk of this Court shall deliver such warrant to the Sheriff of Mobile County, Alabama, to be by said Sheriff delivered to the said Warden together with the said Edward Boykin, Jr.

AND it is further ordered and adjudged by the Court that immediately upon receipt of said warrant the Sheriff shall transport said Edward Boykin, Jr., to Kilby Prison at Montgomery and shall there deliver said Edward Boykin, Jr., and the warrant aforesaid into the hands of the Warden and shall take from the said Warden his receipt for said Edward Boykin, Jr. and said warrant, which said receipt the Sheriff shall return to the office of this court.

AND thereupon in open court on this day at the time of the sentence the defendant gave notice of appeal and moved the court to suspend execution of sentence pending appeal. It is, therefore, ordered and adjudged by the Court that execution of the sentence in this case be and the same is hereby suspended pending appeal.

AND it is further ordered and adjudged by the Court that the Sheriff of Mobile County, Alabama, be and he is hereby ordered to immediately transport the said Edward Boykin, Jr., to Kilby Prison at Montgomery, Alabama, there to be held pending appeal in this case.

DATED at Mobile, Alabama, this the 21st day of September, 1966. Walter F. Gaillard, Judge.

## ORDER, COURT REPORTER TO PREPARE AND FILE TRANSCRIPT OF TESTIMONY—October 28th, 1966

State of Alabama ) Robbery—
Gaillard -vs- 15520 ) Order Appointing Court Reporter to Tran-
Edward Boykin, Jr.) scribe Testimony and Proceedings, to be
(Col. Male - Age ) ) paid by the State.

This day in open court came the State of Alabama by its District Attorney and thereupon in open court on this day; It is ordered and adjudged by the court that Mrs. Madelyn Bryars, Official Court Reporter be and she is hereby ordered to transcribe testimony and proceedings had at the trial of this case and to file Transcript of Testimony and Proceedings with the Clerk of the Circuit Court of Mobile County, Alabama, to be paid by the State.

IN THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF ALABAMA,
MOBILE, COUNTY

Criminal Division # 15520

STATE OF ALABAMA

*vs*

EDWARD BOYKIN, JR., DEFENDANT

BE IT REMEMBERED: That heretofore on to-wit, the 20th day of September, 1966, being one of the judicial days of the said court, this cause came on for trial before the Honorable Walter F. Gaillard, sitting as Judge of the said Court, and a Jury, whereupon the following testimony was offered and proceedings had, in due form of law:

* * * *

APPEARANCES

For the State of Alabama:

Hon. Sidney Pfleger, Assistant District Attorney, Mobile, Alabama

For the Defendant:

Hon. Evan Austill, Van Antwerp Building, Mobile, Alabama.

[fol. 3] MR. PFLEGER: I would like for the record to show, if I am correct that there are twelve of the panel of jurors seated in the jury box. I would like the court to ask the defendant whether or not he is satisfied with those twelve men and if he wishes to have all of these cases heard before the same jury.

THE COURT: Are you satisfied with these twelve gentlemen?

EDWARD BOYKIN: Yes.

THE COURT: Do you wish all five cases to be heard before the same jury?

EDWARD BOYKIN: Yes.

THE COURT: Does that meet with your approval?

MR. AUSTILL: Yes, sir. I have already talked with him about it.

MR. PFLEGER: If you will qualify them we will proceed.

Whereupon the jury was qualified and there being no objections or exceptions to the qualification by the court the same is omitted from this transcript.

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James V. Loper, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please, sir?

A James V. Loper.

Q What is your business or occupation, Mr. Loper?

A Manager, grocery.

Q And what is the name of the grocery, sir?

A Pak-A-Sak.

Q And where is the store that you are manager located at, sir?

A 763 Summerville Street.

Q Is that in the City and County of Mobile, State of Alabama?

A Yes, sir.

Q Were you acting as such manager back on the night of May the 8th, 1966?

A Yes, sir.

Q On the night of May 8th, 1966 at about eleven P.M. did anything unusual happen in your grocery store?

[fol. 4] A Yes, sir.

Q What happened, please, sir?

A This particular defendant here entered with a gun. He didn't have a gun in his hand when he entered . . .

Q Now you say this particular defendant, are you speaking of the boy sitting over here . . .

A This boy right here. (Indicating)

Q . . at the defense table?

A Yes, sir. And asked for some matches and I handed them to him and in the meantime he pulled his gun out, see.

Q And af[illegible]he pulled his gun out what did he say and do, sir?

A Well, he had me to lay down and another boy got the money out of the register while he was doing the gun around.

Q This particular individual was waving the gun around making you lie on the floor while the other man took the money from the cash register?

A Yes, sir.

Q Was that money in the cash register under your control and your supervision and possession?

A Sir?

Q Was that money under your possession and . .

A Yes, sir.

Q . . or your property there insofar as the store was concerned?

A I was in charge.

Q You were in charge. Now how much money did they take, sir?

A $260 or $262. I don't remember just what.

Q $262. And what did it consist of, if you will, sir?

A Ones, fives, nickels, dimes, quarters, halves, maybe a few tens.

Q Was that lawful currency of the United States Government?

A Yes, sir.

Q Did you—did he take this money against your will?

A Yes, sir.

Q Did he threaten you in any way, other than . .

A Well, he had this gun and he had us to lay down on the floor while they got the money.

Q All right, sir. Mr. Loper, after he took the money what happened then, sir?

[fol. 5] A Well, after he got the money he turned and goes out the door and shoots back to see that we don't [illegible]et up and follow him, I guess.

Q Shot back in the store?

A Through the door.

Q Through the door. Were there other people in the store at the time?

A Yes, sir.

Q Did the—could you tell where the bullet went that came in the store?

A Yes, sir. It entered the door and went up in the ceiling and come back down and went over mine and another boy's head and then fell on the floor and one of the officers picked it up.

Q Now, who was the other boy, sir?

A Harmon Weaver.

Q Are you positive that this is the man. . .

A I know it was.

Q . . that had the gun, and the other man that was with him took the money?

A That's right.

Q They left together?

A They left together.

Q Who opened the cash register, Mr. Loper?

A Harmon Weaver, this boy that was working with me. The boy that he told to get the money out didn't know how to open it, so he made him get it out before he lay down.

Q Did he point the pistol toward you and make him open the cash register before he lay down?

A Yes, sir.

Q Did he make any threats as to what he would do to you?

A Well, Harmon kind of hesitated laying down and he used some mighty ugly words, meaning hustle, you know. Called him a name and told him to get down.

Q Did he tell him what he would do if he didn't get down?

A He just told him to get down you so and so.

MR. PLFEGER: No further questions of Mr. Loper.

MR. AUSTILL: We have no questions, Your Honor.

[fol. 6] Harmon Alton Weaver, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please, sir?
A Harmon Alton Weaver.
Q And where were you employed back on May 8th, 1966?
A Pak-A-Sak number 9, 763 Summerville Street.
Q Is that where Mr. Loper was the manager?
A Yes, sir.
Q About eleven o'clock on that night did something unusual happen there?
A Yes, sir.
Q What happened, if you can tell us, Mr. Weaver?
A Well, the defendant, he came in and asked for some matches and while Mr. Loper was getting him the matches he pulled out his gun and demanded the money.
Q Now, you say the defendant, are you referring to the man seated over here with the white shirt on and green trousers?
A Yes, sir.
Q And he is the man that had the gun?
A Yes, sir.
Q What did he do with the gun, sir?
A Well, he waved it around and told this other boy to come in and get the money out.
Q Who opened the cash register?
A I did.
Q Did you do it voluntarily?
A No, sir.
Q What did he do to make you open the cash register?
A Well, he caught me by the shirt and pointed the gun up and told me to open it.
Q Did he make any threats about your life or anything while he was talking?
A Well, when he told me to open it I didn't hesitate.
Q You didn't hesitate?
A No, sir.
Q I'll ask you again, did he make any threats if you didn't lay down?
[fol. 7] A Yes, he made . . .

Q What threats did he make?
A He called me a few dirty words, and . . .
Q What else did he say?
A Well, that's about all.
Q Now you are positive that is the man at that particular time?
A I am positive.
Q After they took the money out of the cash register what took place?
A Well, after they got the money and started to leave he turned and shot back through the store.
Q Shot back through the store.
MR. PFLEGER: No further questions.

ON CROSS EXAMINATION

By Mr. Austill

Q Your name is Weaver?
A Yes, sir.
Q Mr. Weaver, what did you do after you gave him the money? Did you get back down on the floor again?
A Yes, sir.
Q You and Mr. Loper remained on the floor until after he left?
A Yes, sir.
Q Were you still on the floor at the time that he shot the pistol?
A Yes, sir.
Q The pistol did what—shot in through the door, you say, and hit the ceiling?
A Yes, sir.
Q Was anybody persuing him at the time he fired the pistol?
A No, sir.
Q You were on the floor.
A We were on the floor.
MR. AUSTILL: All right, sir.
MR. PFLEGER: Court please, that will be all the evidence insofar as the Loper case is concerned, case number 15526.

[fol. 8] Annette Fawcett, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please, ma'am?
A Mrs. Annette Fawcett.
Q Mrs. Fawcett, what is your business or occupation?
A I have a drug store.
Q And where is it located, please, ma'am?
A 2011 Springhill Avenue.
Q Is that in the City and County of Mobile, State of Alabama?
A Yes, sir.
Q Mrs. Fawcett, were you operating that store back on May 6, 1966?
A Yes, sir.
Q At about nine o'clock on that evening, or thereabouts, did anything unusual happen in your drug store?
A Yes, sir.
Q What unusual happened, please, ma'am?
A Well, I had a couple of customers come in—we have a little bell and it rings and the door opens—as they went out these two boys went over to the ice cream cabinet and got a half gallon of ice cream and came over to the back counter—you see, we have two registers, one in the front and one in the back—and put the ice cream on the counter. I noticed that he went back to the school supply rack which is over near the ice cream cabinet and when he came back he said—threw a dollar bill on the counter and they were divided, one was by the register and one was by the adding machine.
Q Now, do you see anybody in the courtroom that you are referring to that was there on that occasion relative to the buying of the ice cream?
A No, sir. Mrs. Van Aikin—John B. Waterman's son-in-law came and got a package and went out just as they came in and I don't know who else. Somebody was at the magazine section, but I don't remember who it was.
Q Did you see this man seated over here with the white shirt and green trousers on?

A Yes, sir.

[fol. 9] Q Did he come into your drug store there?

A Yes, sir.

Q Was he one of the two buying ice cream?

A Yes, sir. He had on the green beret.

Q He had on a green beret.

A Yes, sir.

Q Then what did he do, please, ma'am?

A Well, he threw the—put the ice cream on the counter and I think he had previously worked for us. I thought maybe he might be just cutting up, but he said —I said, "Well, I don't think that will be enough because I have to have tax." And he said, "And the book, and the book, and the book." And he put the book up against the wrapping counter which would make it stick up about an inch, you know. I said, "What type book is it?" It was a composition book that has a glazed back, you know, and it was red. I knew we didn't have anything but the twenty five and sixty nine because we were out of the forty nine. "What size is it?" And he kept on saying, "And the book, and the book, and the book." And I leaned over to see what—how wide the book was, if it was a big book or a little book and when I did he reached across and grabbed me here (indicating) and said, "Don't say a word."

Q Grabbed you by your dress?

A Yes, sir, right here (indicating) and said, "Don't say a word." And he put the gun—pulled it out of the book, see. As I looked for the book he pulled the book up and the gun was in the book.

Q Gun was in the book?

A Yes, sir.

Q Was this man seated over here the man that had the gun?

A Yes, sir.

Q Then after he had the gun and pointed the gun at you and told you not to say a thing what did you see then, ma'am?

A I didn't do a thing because the younger boy that was with him came—the register is where there is a entrance to the back of the counter and the adding machine

is where there is an entrance into the back of the counter and the prescription room. Well, he pulled me on back to where the adding machine was and the other boy came on around to the register to open it. He put the gun in my back and he said—and the boy didn't seem to know [fol. 10] much about the register and he punched down something on the register that he couldn't push it, and so he asked me—kept on saying, "Open the register, open it, open it." So I said,—in a few minutes it opened. He kept on pushing it and it did open. Then he said, "Don't say a word," or something like that. Then I said, "Just take it all because," I said, "I carry insurance. Don't worry about that." And then . .

Q Were you frightened at the time?

A Sir?

Q Were you frightened at the time?

A No, sir, I wasn't frightened.

Q You weren't frightened?

A No, sir.

Q But the man had the gun on you?

A Yes, sir.

Q You didn't willingly part with the money, did you, Mrs. Fawcett?

A No, sir.

Q And he took the money as a result of having the gun on you and opening the register?

A Yes, sir. My delivery—you see, our delivery boy had arrived in boots and he had just gone to the wareroom, which is back of the prescription department, to take his boots off and put on his regular shoes. And he heard all this—"And the book, and the book, and the book" was kind of loud and so he came to see what had happened. And as he come out of the wareroom door into the prescription room they saw him and they made him come up behind the cash register with me.

Q You say he took the money. How much money did he take?

A It was about $373., I believe it was.

Q And what was that composed of, Mrs. Fawcett?

A Well, I'll tell you, it was two registers, see. It was nickels, dimes, quarters, halves—now, they left most of

the pennies in my register, the back register, and left a few dimes and they left two checks in the back.

Q Were there any bills?

A Yes, sir, bills.

[fol. 11] Q Ones, fives and tens?

A Yes, sir.

Q Was all that money lawful currency of the United States Government?

A Yes, sir.

Q Now, did they go quietly out of the place, Mrs. Fawcett?

A Well, the thing about it is, as the younger boy went to the front register this boy took us to the back, to the wareroom—on through the prescription room into the wareroom and threw the gun back and forth, because—and I looked to see if the gun was loaded because I carry a gun. I have a permit to carry a gun. I wouldn't want to jurt anybody myself, but anyway, he kept on flashing it and it looked like an unusual gun to me because my gun is entirely different. I kept looking to see if it was loaded and I could see it was loaded. And then he said, "And the keys, and the keys, and the keys; give me the geys, give me the keys." I didn't know what—I thought he was talking to the boy out front about the keys, that was while he was at the front register, and at the back he did the same thing. I realized that he wanted my car keys and so then he decided he would take us with him, take the delivery boy, which is a colored delivery boy, and me with him in my car. And we were going on out and —our store closes at nine and so does Foodtown—and the little girl in front had run next door to get me a loaf of bread and as she walked in the door—I had asked her what time it was. I said, I have no idea. I said, after you got shot I kind of lost consciousness." She said it was exactly nine o'clock when I looked up at the door. Said, "When I walked in and I saw the young boy in the front register I said to him, "What in the dickens are you doing". Said, she got about that far and then she said, "Oh, my God, I'm shot."

Q Now, who fired the pistol?

A He had the pistol.

Q He had the pistol?
A Yes, sir.
Q The pistol was fired. . .
A It was fired from back at the back cash register.
Q And the young girl was shot. Where did she get shot?
A It was in the thigh—in the calf of her leg.
[fol. 12] Q Calf of her leg?
A Yes, sir.
Q Now, that money that was taken, was that your money?
A Yes, sir. We usually carry a lot more money than that. And, of course, the checks that I found I deducted them from it. And I just now found out I've got the checks still with me. People had told me they had never gone through and I couldn't understand that. I thought sure I had deposited them but I think I must have forgot it.
Q All that happened on May 6th about 9'o'clock on Springhill Avenue, in the City and County of Mobile, State of Alabama?
A Yes, sir. I didn't get excited until the girl got shot. I hadn't ever seen anyone shot before. I don't know whether he intended to shoot her or not. I think maybe he intended to shoot just to frighten because the officer said it hit the floor and, you know.
MR. PFLEGER: No further questions.

ON CROSS EXAMINATION

By Mr. Austill

Q Mrs. Fawcett. . .
A Yes, sir.
Q . . where were you now when this lady got shot?
A The lady got shot. I was—he was bringing us out of the wareroom into the prescription room—and the prescription room you go out the door into the front of the store—and the little bell rang and she walked in with a loaf of bread. She hadn't looked back at the back to see anything was going on, she was talking about the front one; she was thinking of the man at the front register,

what he was doing in the register. She said, "What in the dickens—" like that, she said. And all of a sudden she said, "Oh, my God, I'm shot."

Q Now who was bringing you from the back? Was it this boy?

A He was. He was bringing my delivery boy and me both. He was going to take us in my car. See, he wanted the keys.

Q Now, the girl that got shot, was—she was where? She was up at the front of the store?

A Yes, sir. She had come—she had run next door. [fol. 13] See, we close at nine and Foodtown closes at nine and I asked her to run get me a loaf of bread and she had. She just stepped out and stepped back in, you see. It all happened it seemed like to me in five or ten minutes.

Q Did you see her when she got shot?

A Yes, sir, and I have never seen anybody shot before. I was so afraid that it was—I thought it was two shots. I was so afraid it was internal when they brought the ambulance, you know.

Q Which boy shot?

A The boy that had the gun.

Q Did you see him shoot her or you figure he shot her because you saw him have a gun earlier?

A Well, I didn't see him shoot her, but I know he shot because the gun—in the position he was in front of my register—the bullet hit the floor and just glazed the floor, you see. I don't believe that he really intended to kill her but . .

Q In other words the bullet . .

A He knew that he couldn't get out any other way because our back door has got about six or eight locks on it. There would be no way in the world unless you broke a window to go out the back.

Q You say the bullet hit the floor first and then ricocheted. .

A Yes, sir. She still has the bullet in her leg.

Q You didn't see this boy shoot?

A Yes, sir.

MR. AUSTILL: That's all.

ON RE DIRECT EXAMINATION

By Mr. Pfleger.

Q She still has the bullet in her leg?
A In her leg, yes, sir. Doctor Lindsay is her doctor and she went two weeks ago to check on it because he wants it to work out because it is between two small bones in the calf of the leg.
Q Now, this man here seated at the table is the only one you saw with a pistol on that occasion?
A Yes, sir. He's the only one that had the pistol.
MR. PFLEGER: No further questions. You may step down. That is all on the Fawcett case.

[fol. 14] Jerry Smith, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please?
A Jerry Smith.
Q And how old are you Jerry?
A Sixteen.
Q Jerry, did you have a job back in April of this year?
A Yes, sir.
Q Were you working on April 23rd, 1966?
A Yes, sir.
Q And where were you working?
A At the Dairy Castle.
Q Who owns and operates the Dairy Castle?
A Walter Hersh.
Q Mr. Walter Hersh. On that night about eleven forty, did anything unusual happen?
A Yes, sir.
Q What happened that was unusual?
A Well, it was pretty near closing time and I was going to empty the trash. I was going out the back way and this man was squatting. He looked like he was at the door trying to unlock it.
Q The man was at the door trying to unlock it?

A Yes, sir, at the back door as I was going out to empty trash.

Q Do you see that man in the courtroom here today?

A Yes, sir.

Q Where is he, please?

A Sitting over there.

Q Is he the man with the white shirt and green trousers?

A Yes, sir.

Q What did he do then, please?

A Just as soon as I got near the door he opened it and put a gun on my back and said turn around and get to the front.

Q He put a gun on you. Did you see the gun?

A Yes, sir.

Q Then what did he do?

A He said get to the front or I'll shoot, so I walked [fol. 15] to the front.

Q After you walked to the front what happened?

A Well, I looked at our manager and she said—I just looked at her kind of stunned and she said, "Open it", and I opened the cash register and walked back. He started gathering the money then.

Q He said open the cash register and you stepped back. What did he do then?

A No, sir. I went up there and I looked at our manager.

Q Looked at the manager?

A Yes, sir. And she said open it so I opened it. I backed off and he started getting the money.

Q Where was the gun at that point?

A Well, when he came in he saw her and kind of waved it over at her.

Q That's when she told you to open the cash register?

A Yes, sir.

Q And when you opened the cash register did he take the money?

A Yes, sir.

Q Do you know how much money was taken?

A Approximately three ten—two ten.

Q Now, did Mr. Hersh come over there right afterwards?
A Yes, sir, after he left.
Q Now, that money that was taken, what did that consist of?
A Well, he took all of the small change. Took every bit of the change out of the register.
Q Was that made up of nickels, dimes, quarters and half dollars?
A Yes, sir.
Q And was the balance made up of one dollar bills, fives, tens and twenty dollar bills?
A Yes, sir.
Q And was all that lawful currency of the United States Government?
A Yes, sir.
Q Now, did you give it to him or did he take it against your will?
A No, sir, he took it.
Q He took it. At pistol point?
A Yes, sir.
Q Now, that place of business, where is it located?
A 1614 St. Stephens Road.
[fol. 16] Q Is that here in the City and County of Mobile, State of Alabama?
A Yes, sir.
Q And this was about what time at night?
A About a quarter to 12.
Q About a quarter to 12. No further questions.
MR. AUSTILL: No questions.

Walter Hersh, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q You Mr. Walter Hersh?
A Yes, sir.
Q Do you own the Dairy Castle located at 1614 St. Stephens Road?
A I do.

Q Were you at the place on the night of April 23rd, 1966?

A I wasn't inside. I live behind it.

Q At about 11:45 that night did you have any occasion to go over to your place of business?

A I did not. They called me after the robbery.

Q They called you?

A Yes, sir.

Q Did you check up to find out how much money was taken?

A Yes, sir.

Q How much money was taken?

A Approximately two hundred and nine dollars.

Q How was that made up?

A Small change—different change and dollar bills, fives, tens and twenties.

Q All that lawful currency of the United States Government?

A Yes, sir.

Q And that was your money that was under the custody of the manager and Jerry Smith . . .

A That's right.

Q . . . running the place?

A Yes.

MR. PFLEGER: No further questions.

[fol. 17] MR. AUSTILL: No questions.

MR. PFLEGER: We have no further evidence, Court please, in the—that particular indictment.

John E. G. Campbell, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please?

A John E. G. Campbell.

Q What is your business or occupation, Mr. Campbell?

A I operate a business which is a combination service station, garage, grocery store and general merchandising all combined in one.

Q Where is it located?

A 1714 Virginia Street, one block east of Houston.

Q Is that here in the City and County of Mobile, State of Alabama?

A Yes, sir, it is.

Q Were you operating that place of business on May 5, 1966, Mr. Campbell?

A Yes, sir.

Q Mr. Campbell, about eight or 8:30 somewhere along in there, did anything unusual happen at your filling station?

A Yes, sir, Mr. Pfleger, it did.

Q What took place at that time and place?

A This young man over here and an accomplice came into my place of business and held me up.

Q You say this young man over here, you mean the man with the white shirt on and green trousers?

A Yes, sir.

Q Edward Boykin?

A Edward Boykin.

A Just what did he do, please?

A Well, I noticed the two of them coming in. My daughter and myself were in the store. I didn't notice the shape of the bag he had in his hand at the time. The two walked in the front door and around toward the back of the store. I noticed his accomplice was looking at the meat box I have in the back and I said, "Do you want some meat back there?" And he said, "Yes, sir, I want some [fol. 18] boloney." I said, "Well, I keep all my meat up here in the front in my dairy case, that box doesn't work." So his accomplice came on up and was looking in the dairy case at the packaged lunch meats and I noticed him coming on down the aisle about as far as from here to that table away from me where I was standing at the check out counter with my daughter. At that time I noticed that the bag in his hand was in the shape of a gun, and I knew what was coming off. I just stepped out from behind the counter to keep him from putting the gun on my daughter and myself and walked up to him and said, "Son what have you got in that bag?"—knowing all the time what he had. By the time I reached him he had the gun

out of the bag and with his left hand he grabbed my right wrist here (indicating) and threw the gun in my face.

Q Threw the gun in your face. That's the man that is seated here?

A That's exactly him.

Q After he threw the gun in your face, what did he do then, please?

A He said, "This is a stick-up."

Q All right, sir.

A "I want your money."

Q What else?

A I told him—I said, "Son, you are going the wrong road." I said, "You can't get nowhere like that, it's the wrong thing to do and you just can't profit by it." He said, "I want your money and don't want nothing else." And he kept on cursing me, calling me—I better not repeat it. At one time he made the remark, "I ought to kill you right now." I just continued talking to him all the time and he had his accomplice to go to the cash register and open the cash register and take the money out of the register.

Q How much money did they take from the register?

A Took approximately a hundred and forty five dollars.

Q And how was that made up, please, sir?

A It consisted of quarters, ones, fives, tens and possibly a couple of twenties. They did not touch the nickels, dimes and pennies.

Q Now, did they take that money out of your cash register against your will?

A Sure did.

Q And at that time you say the accomplice was taking [fol. 19] the money out he still had the pistol pointed at you?

A He still held me by the wrist—he held me by my right wrist all the time with his left hand and his gun in my face with his right hand. All the time.

Q After he took the money, what did they do then, please, sir?

A He told me—said, "Give me the keys to that car out there." I had a brand new car outside which belonged to

Grady Buick Company while they were servicing mine. So with my left hand I reached in my pocket and give him the keys to this car of Grady Buick's. So his accomplice took the keys and had the money and was going on out the door and he was still holding me by the hand at the same time going out the door.

Q He was taking you out the door, had the gun on you . . .

A Yes, sir.

Q . . . and had taken the keys to the automobile under your control that belonged to Grady Buick?

A That belonged to Grady Buick Company. His accomplice had the keys and the money and was proceeding on out the door first. He made the remark to my daughter—says, "Honey, don't call the police until your daddy gets back. We are going to take him around the corner, drive a couple of blocks and let him out." Said, "Don't call the police until your daddy gets back." My daughter was petrified. Just as—between the time his accomplice got out the front door and before we could get to it, an automobile drove up to the front door and stopped right at the door no further than from here to there (indicating) with four young white men in it. When he saw them he took the gun off of me and put it down by his side but continued holding my right wrist with his left hand. And with his gun down by his side like that and holding my arm he told his accomplice—said, "Come on, man, get in the car." Well, his accomplice had the money and the keys and he was only interested in getting away. He proceeded on around the side of the building, down the Weinacker Avenue side. Finally he had gone about sixty or seventy feet and he had took me about half that far, calling his accomplice all the time to come back and get in the car, which his accomplice—he wouldn't say a word, just kept going. At that time I reckon he knew that his accomplice was not going to come back and get in the car [fol. 20] so he turned my arm loose. At that time I just turned around and come on back into the station and called the police. The two of them was running down Weinacker Avenue. They ran on down Weinacker Avenue toward Government Street and from testimony that was given me by my neighbors. . .

Q You can't tell what somebody else. . .
A They went on down Weinacker Avenue toward Government Street.
Q Are you positive that this was the man that had the gun on you and had the other man take the money out of your cash register?
A Yes, sir, I sure am.
Q He's the man that told your little daughter not to call the police?
A Yes.
Q And they had you and let you go later?
A Yes, sir.
Q And he was the man that was pulling you out the door with a gun in your face, pulling you by your left arm. All that took place here in the City and County of Mobile, State of Alabama?
A Yes, sir.
MR. PFLEGER: No further questions.
MR. AUSTILL: No questions.
MR. PFLEGER: That's all we have to offer on Mr. Campbell, if the court please.

Sylvester Pugh, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name?
A Sylvester Pugh.
Q What is your business or occupation?
A Service station operator.
Q And where is that service station located, Mr. Pugh?
A 1360 Springhill Avenue.
Q Is that in the City and County of Mobile, State of Alabama?
A Yes, sir.
Q Were you operating that station, Mr. Pugh, back on May 3rd, 1966?
[fol. 21] A Yes, sir.

Q At about nine o'clock or thereabout on that date did anything unusual happen in your filling station?

A Yes, sir.

Q What unusual thing happened, please, sir?

A Well, at nine o'clock it's closing time and I was checking the register, checking out to close up and two fellows walked into the door and said, "Give me change for a dollar." I was standing there counting my dimes and I said, "Just a minute. When I get these counted I will give it to you." I turned back and started counting my dimes and when I did he said, "That's all right, I'll just take it all." I turned around and he had a 45 in my face.

Q Do you see that fellow in the courtroom?

A Yes, sir.

Q Where is he, please?

A Sitting right over there.

Q Man in the white shirt with green pants, named Edward Boykin?

A That's right.

Q And you say had a .45 in your face?

A Yes, sir.

Q What did he tell you he would do with the .45, if anything?

A When he said I'll take it all and I turned around and he had that .45 in my face he said, "If you try anything I'll blow your brains out."

Q And what did you do then relative to your money?

A Well, he said, "Hand it to me." So I just taken my left hand and handed it to him, like that.

Q Still holding the .45 on you?

A We dropped some of it on the floor and he picked that up too.

Q And how much money did he take, sir?

A A hundred fifty eight dollars and twenty eight cents.

Q And how was that made up, sir?

A Pennies, nickels, dimes, quarters, halves, ones, fives, tens and twenties.

Q Was all that lawful currency of the United States Government?

A Yes, sir.

Q That was your money?

[fol. 22] A Yes, sir.

Q Did you stay there at the place there then, Mr. Pugh?

A No, sir. After he got my money he said, "Come on, go with me." I said, "Man, I can't leave this station." He said, "Come on, do what I say."

Q Did he still have the gun on you?

A Yes, sir.

Q And then what did you do then?

A He said, "Just come on down the road with me a little piece." Then he kind of pulled that gun back a little and I said, "Boy, don't hit me with that gun." He said, "I ain't going to hit you with it, but come on go with me." Said, "It won't be nothing to it, but I just want you to go a little piece with me." So he walked me a half a block away from the station.

Q He walked you a half a block away from the station. And then did he go one way and you another?

A Yes, sir. When we got about half a block away he said you can go back now and I went back.

Q Did you willingly part with your money?

A No, sir.

Q He took it at the point of a pistol, .45 caliber pistol?

A That's right.

MR. PFLEGER: No further questions.

MR. AUSTILL: No questions.

MR. PFLEGER: Judge, I think the State will rest. I think we have sufficient evidence on each one of the cases to support the indictments. Does the defense have any evidence?

MR. AUSTILL: No.

THE COURT: He is free to put on any evidence.

MR. AUSTILL: Yes, sir. He has none.

(Whereupon the attorneys proceeded to make their final summation to the jury.)

## ORAL CHARGE TO THE JURY

THE COURT: Some of you gentlemen were on the [fol. 23] jury yesterday, but I've got to briefly restate the law as to what robbery is. This defendant has plead guilty to robbery in five separate and independent cases. Now robbery, once again gentlemen, is the felonious taking of money or goods of value from another against his will and without his permission by violence or by putting him in fear. That boils it down in a nut shell just what robbery is. Now, it carries from ten years minimum in the penitentiary to the supreme penalty of death by electrocution. I'll have the forms for you in just about one minute. One form has been written up here. If you decide not to give death by electrocution, of course, the form on the indictment you can use that. On the other hand, gentlemen, there will be a form—I'll send it to you in the jury room—where if the jury finds the defendant guilty of the offense of robbery as charged in the indictment and fixes the penalty at death by electrocution. You will have that form. You can use either one form or the other when you arrive at your verdict. Do you have any exceptions as to what the court has said?

MR. AUSTILL: No, sir.

MR. PFLEGER: None for the State.

JUROR: We have five cases. These sentences will not run concurrently, will they?

THE COURT: They will not run concurrent unless the jury requests it.

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## VERDICT

THE COURT: Gentlemen, have you arrived at your verdict?

JUROR: We have, Your Honor.

THE COURT: Is that the unanimous verdict of the jury?

JUROR: Twelve yes votes.

THE COURT: Will you please read the verdict?

CLERK: In case number 15520, State of Alabama against Edward Boykin, Jr. We, the jury, find the defendant guilty of robbery as charged in the indictment on

his plea of guilty, and further find that he suffer death by electrocution. E. J. Strong, Foreman. Case number 15521, State of Alabama against Edward Boykin, Jr., We, the jury, find the defendant guilty of robbery as charged in the indictment on his plea of guilty and further find that he shall suffer death by electrocution. E. J. Strong, Jr., Foreman. In case number 15522, We, the jury, find the defendant guilty of robbery as charged in the indict- [fol. 24] ment on his plea of guilty and further find that he shall suffer death by electrocution. E. J. Strong, Jr., Foreman. Case number 15523. We, the jury, find the defendant guilty of robbery as charged in the indictment on his plea of guilty and further find that he shall suffer death by electrocution. E. J. Strong, Jr. Foreman. Case number 15526. We, the jury, find the defendant guilty of robbery as charged in the indictment on his plea of guilty and further find that he shall suffer death by electrocution. E. J. Strong, Jr., Foreman.

THE COURT: Have the defendant stand up, will you.

(Defendant rises and stands beside his attorney.)

THE COURT: Edward, do you have anything to say as to why sentence should not be imposed upon you?

DEFENDANT: No, sir.

THE COURT: Well, you have heard the verdict of the jury and the court is not going to make mockery of this jury by overriding the jury and making any recommendations at all, certainly not clemency or anything of that sort. It is now in the hands of the State and it is up to the Governer if he cares to do anything about it. It is not up to the trial judge. In case number 15520 the court will impose sentence according to the verdict of the jury and sentences you to death by electrocution. In case number 15521, the court again will follow the verdict of the jury and sentence you to death by electrocution. In case number 15522 the court will sentence you to death by electrocution. In case number 15523 the court sentences you to death by electrocution. In case number 15526 the court sentences you to death by electrocution.

DEFENDANT: Let me see my lawyer.

THE COURT: All right.

At 9:00 o'clock A.M. on September 21, 1966 the following occurred:

THE COURT: Young man I had to call you back to supply an omission in the sentence I imposed yesterday. The law requires that this court fix the date of the execution and inadvertently I failed to do that, so I am going to correct the verdict by supplying that omission. Again I ask you, do you have anything to say as to why the sen- [fol. 25] tence should not be be imposed?

DEFENDANT: I don't have anything to say. I would like to talk to my lawyer.

THE COURT: What? Talk to Mr. Austill?

DEFENDANT: Talk to my lawyer.

THE COURT: Mr. Austill, he wants to talk to you.

(Whereupon attorney and defendant have a conference.)

THE COURT: Do you have anything to say?

DEFENDANT: No.

THE COURT: Well, in case number 15520 the court imposes the following sentence: The court sentences you to suffer death by electrocution and fixes the date for December the 16th, 1966. In case number 15521 the court sentences you . . .

MR. PFLEGER: Judge, would you ask him again just so the record will reflect he has been asked in each case.

THE COURT: In case number 15521 taking property in the custody of or belonging to Jerry Smith, do you have anything to say as to why verdict should not be imposed—sentence should not be imposed in that case?

DEFENDANT: No.

THE COURT: The court sentences you to suffer death by electrocution and fixes the date, December 16th, 1966. In case number 15522 taking property of E. G. Campbell, do you have anything to say as to why sentence should not be imposed.

DEFENDANT: Yes, sir, I want to ask my lawyer something.

(Whereupon defendant and attorney have conference.)

DEFENDANT: No.

THE COURT: The court sentences you to death by electrocution and fixes the date of your execution December 16th, 1966. In case number 15523, taking the property belonging or in the custody of Sylvester Pugh, do you have anything to say as to why the sentence should not be imposed?

DEFENDANT: No.

THE COURT: The court sentences you to suffer death by electrocution and fixes the date of your execution as December 16th, 1966. In case number 15526, taking the property of or in the possession of J. V. Loper, do you have anything to say in that case as to why the sentence should not be imposed?

[fol. 26] DEFENDANT: No.

THE COURT: The court sentences you to suffer death by electrocution and fixes the date of your electrocution December 16th, 1966.

[Clerk's and Reporter's Certificates Omitted in Printing]

## IN THE SUPREME COURT OF ALABAMA

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, GOODWYN, MERRILL, COLEMAN AND HARWOOD.

1st Div. 403

EDWARD BOYKIN, JR.

*vs.*

STATE OF ALABAMA

MOBILE CIRCUIT COURT
March 6, 1967

Come the parties by attorneys and submit this cause on briefs for decision.

* * * *

# IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1967-68

1 Div. 403

EDWARD BOYKIN, JR.

*v.*

STATE OF ALABAMA

Appeal from Mobile Circuit Court

OPINION—February 8, 1968

COLEMAN, JUSTICE.

This is an appeal from a judgment convicting defendant of robbery and sentencing him to death by electrocution.

The record discloses that defendant pleaded guilty to five separate indictments charging him with committing five separate robberies, respectively. The instant case is No. 15520 in the circuit court. Defendant pleaded guilty to the indictment in the instant case.

The evidence shows that, on May 6, 1966, at about nine o'clock in the evening, defendant and a companion entered a drug store in Mobile. The person robbed, Mrs. Annette Fawcett, testified that defendant came into the store wearing a green beret; that he put some ice cream on the counter; that he also had a book which he put up against the wrapping counter; that the witness leaned over to see how wide the book was; that defendant reached over and grabbed the witness by her dress and said "Don't say a word."; that defendant pulled a gun out of the book and pointed the gun at the witness; that defendant pulled the witness back to where the adding machine was and the other boy came around to the register to open it; that defendant put the gun at the witness' back and kept on saying "Open the register, open it, open it."; that defendant kept on pushing it and it did open; that defendant took

from the cash registers the money which was about $373; that defendant took the witness back to the "wareroom and threw the gun back and forth"; that the witness looked at the gun and could see that it was loaded; that defendant said "And the keys, and the keys, and the keys; give me the geys, give me the keys."; that witness realized defendant wanted her car keys and then defendant decided he would take witness and a colored delivery boy with defendant in the witness' car; that they were going on out and the little girl in front who had run next door to get a loaf of bread walked in the door; that the girl said "Oh, my God, I'm shot."; that defendant had the pistol and it was fired; that the young girl was shot in the calf of her leg; that the witness did not get excited until the girl was shot; that witness thinks defendant intended to shoot just to frighten because the officer said "it" hit the floor; that the girl still has the bullet in her leg; that defendant was the only one that had the pistol.

Counsel for defendant argues two propositions for error. Counsel says the punishment for robbery must be imposed by the jury and that the record does not disclose compliance with statutory requirements since the judgment on September 21, 1966, was not the result of any jury verdict.

The record does not support defendant's contention. The judgment recites that a jury, E. J. Strong, Jr., Foreman, and eleven others do say:

> " 'We, the Jury, find the defendant guilty of Robbery, as charged in the indictment, on his plea of guilty, and further find that he shall suffer death by electrocution.' "

The court reporter's transcript of the evidence recites that "this cause came on for trial before the Honorable Walter F. Gaillard sitting as Judge of the said Court, and a Jury . . . ." The reporter's transcript further recites the reading of the jury's verdict by the clerk. Defendant's first contention is without merit.

Defendant's second contention is that capital punishment for robbery violates the constitutional safeguard against cruel and unusual punishment. The gist of defendant's argument is that the punishment of death is dis-

proportionate to the crime because defendant killed no person in committing the offense.

§ 415, Title 14, Code 1940, recites:

> "Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life. *Weems* v. *United States*, 217 U. S. 349, 370, 54 L. Ed. 793, 30 S. Ct. 544; note 4 in *Francis* v. *Resweber*, 329 U. S. 459, 464, 91 L. Ed. 422, 67 S. Ct. 374.

Any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual in the constitutional sense. Cooley, Constitutional Limitations, quoted in *Weems* v. *United States*, supra. Probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of a similar nature. Cooley, quoted in *Weems* v. *United States*, supra. See also: *In re Kemmler*, 136 U.S. 436, 34 L. Ed. 519, 10 S. Ct. 930; *People ex rel. Kemmler* v. *Durston*, 119 N. Y. 569, 24 N. E. 6; Holmes, C. J., in *Storti* v. *Commonwealth*, 178 Mass. 549, 60 N. E. 210; *Dutton* v. *State*, 123 Md. 373, 91 A. 417; *In re Wells*, 35 Cal. 2d 889, 221 P. 2d 947, cert. den. 340 U. S. 937, 95 L. Ed. 676, 71 S. Ct. 483.

Robbery, from the earliest times, has always been regarded a crime of the gravest character. At common law the punishment for robbery was death, with or without benefit of clergy, according to varying statutes. *Franklin* v. *Brown*, 73 W. Va. 727, 729, 81 S. E. 405, L.R.A. 1915C 557. In Laws of Alabama, 1823, page 207, the punishment for robbery was death. In the Code of 1852, § 3104, page 563, punishment was ten years' imprisonment. Since the Revised Code of 1867, § 3668, any person convicted of robbery, must be punished, at the discretion of the jury,

either by death, or by imprisonment for not less than ten years; or, as in Code 1886, § 3742, by death or by imprisonment for not less than five years; or, as in Code 1896, § 5479, and subsequent codes, by death or by imprisonment for not less than ten years.

We are of opinion that the constitutional prohibition against cruel and unusual punishment has not been violated by the judgment in the instant case. Even in this latter day when some courts are criticized on the charge that they favor the robber more than the victim, we are of opinion that death is not a cruel and unusual punishment.

AFFIRMED.

Simpson and Merrill, JJ., concur.
Lawson, J., concurs specially.
Livingston, C. J., and Goodwyn and Harwood, JJ., dissent.

LAWSON, JUSTICE, concurring specially:

I agree that on the record before us the judgment of the trial court should be affirmed. The opinion of Mr. Justice Coleman, in my judgment, correctly disposes of the questions argued in brief of counsel for the appellant.

The record contains nothing to indicate that Boykin's plea of guilty was not voluntarily and knowingly made or that it was the product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertence. For aught appearing, the plea was entirely voluntary and Boykin fully realized and was competent to know and understand the possible consequences of such a plea. In briefs filed here on behalf of Boykin, by counsel who did not represent him at the trial below, it is not contended that Boykin did not voluntarily and knowingly enter the plea of guilty or that he did not fully realize the possible consequences of such plea.

I am not familiar with any holding of this court to the effect that when a defendant pleads guilty in a capital case the record must affirmatively show that the trial judge did not accept the guilty plea until after determin-

ing that the plea was voluntarily and knowingly entered by the defendant and that the defendant fully realized and was competent to know the consequences of such a plea. And such is not, in my opinion, the holdings of the Mississippi Supreme Court in *Dickerson* v. *State*, 202 Miss. 804, 32 So. 2d 881, and *Yates* v. *State*, 251 Miss. 376, 169 So. 2d 792, cited and relied upon in the dissenting opinion.

In *Howard* v. *State*, (Ala. Sup. Ct.), 194 So. 2d 834, in reviewing the action of a trial court in a post conviction proceeding, we observed: "An accused's plea of guilty may be accepted only if it is made voluntarily and knowingly. If it appears that a guilty plea is the product of coercion, either metal or physical, or was unfairly obtained or given through ignorance, fear or inadvertence, it is void since it is a violation of constitutional safeguards." (194 So. 2d, 837-838) In my opinion the language just quoted is to the same effect as that quoted in the dissenting opinion from *Yates* v. *State of Mississippi*, *supra*.

Of course, a trial judge should not accept a guilty plea unless he has determined that such a plea was voluntarily and knowingly entered by the defendant. But neither the Howard case, *supra*, nor the Mississippi cases, *supra*, hold that the record must affirmatively show that the trial judge made such a determination. The effect of the dissenting opinion is to presume that the trial judge failed to do his duty.

If the trial court did fail to make such an ascertainment, or if the appellant, Boykin, was not adequately represented in the court below, or if because of his youth or ignorance he was unable to fully comprehend the possible effect of having all five cases tried before the same unstruck jury, he can raise any or all of those questions in a petition for writ of error coram nobis. In such a proceeding, of course, the petitioner would be required to produce evidence in support of his contentions. But, in my opinion, there is nothing in this record which would justify a reversal on any of those possible contentions.

GOODWYN, JUSTICE (dissenting):

This is one of five cases (the others being 1 Div. 403 A, 1 Div. 403 B, 1 Div. 403 C, and 1 Div. 403 D) in each of which Edward Boykin, Jr., the appellant in each

case, was indicted, tried, found guilty and sentenced to death by electrocution for a separate offense of robbery. At this arraignment and at his trial, he entered a plea of guilty in each of the cases. By agreement, all five cases were presented to the same jury.

Aside from any other reason, it is my view that the judgments in these five death cases should be reversed and the causes remanded to the trial court because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty. I think what was said in *Dickerson* v. *State*, 202 Miss. 804, 32 So. 2d 881, and *Yates* v. *State*, 251 Miss. 376, 169 So. 2d 792, 802, should be the rule in this State, viz:

> "* * * * * * We do not say that the trial judge may not accept a plea of guilty in a capital case, but if he does so he must see to it, first, that the plea is entirely voluntary and that the defendant fully realizes and is competent to know the consequences of such a plea, * * *."

It is to be noted that we are not dealing here with a case where there was an agreement between the district attorney and the defendant as to a sentence less than capital upon the entering by defendant of a guilty plea.

There is nothing in the record or briefs indicating the defendant's trial strategy in pleading guilty in these five cases.

Livingston, C. J., and Harwood, J., concur in the foregoing dissent.

# IN THE SUPREME COURT OF ALABAMA

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, GOODWYN, MERRILL, COLEMAN AND HARWOOD.

1st Div. 403

EDWARD BOYKIN, JR.

*vs.*

STATE OF ALABAMA

MOBILE CIRCUIT COURT

JUDGMENT—February 8, 1968

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

IT IS THEREFORE ORDERED AND ADJUDGED that the judgment of the Circuit Court be in all things affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that Friday, April 5, 1968, be fixed as the date of execution of the defendant, Edward Boykin, Jr.

IT IS FURTHER ORDERED that the Sheriff of Mobile County, Alabama, deliver the defendant to the Warden of Kilby Prison, in Montgomery County, Alabama, and that the said Warden execute the judgment and sentence of the law on Friday, April 5, 1968, by causing a current of electricity of sufficient intensity to cause death to pass through the body of the said Edward Boykin, Jr. until he is dead, and in so doing he will follow the rules prescribed by the statutes.

# IN THE SUPREME COURT OF ALABAMA

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, GOODWYN, MERRILL, COLEMAN AND HARWOOD.

1st Div. 403

EDWARD BOYKIN, JR.

*v.*

STATE OF ALABAMA

MOBILE CIRCUIT COURT

ORDER OVERRULING APPLICATION FOR REHEARING—March 7, 1968

IT IS ORDERED that the application for rehearing filed on February 22, 1968, be and the same is hereby overruled.

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

1st Div. 403, 403A, 403B, 403C and 403D

EDWARD BOYKIN, JR.

*vs.*

STATE OF ALABAMA

APPEAL FROM MOBILE CIRCUIT COURT
March 18, 1968

WHEREAS, this Court did affirm the convictions of the death penalty imposed on the said Edward Boykin, Jr., in the above styled causes, on February 8, 1968, which date of execution is now set for April 5, 1968, and

WHEREAS, the application for rehearing in each case was overruled on March 7, 1968, and

WHEREAS, the said Edward Boykin, Jr. has filed an application for stay pending an appeal to the Supreme Court of the United States,

NOW, IT IS THEREFORE ORDERED AND ADJUDGED that the execution of the judgments and sentence be stayed and reset for Friday, June 28, 1968, and the sentence of this Court will, on said date, be carried out in all respects according to the laws of this State.

[Clerk's Certificate (Omitted in Printing)]

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

1st Div. 403, 403A, 403B, 403C and 403D

EDWARD BOYKIN, JR.

*v.*

STATE OF ALABAMA

MOBILE CIRCUIT COURT
June 17, 1968

WHEREAS, this Court did affirm the convictions of the death penalty imposed on Edward Boykin, Jr. in the above styled causes on February 8, 1968, and set the date of execution for Friday, April 5, 1968; and

WHEREAS, the application for rehearing in each cause was overruled on March 7, 1968; and

WHEREAS, on March 18, 1968, this Court stayed the execution of the judgments and sentence and reset the execution for Friday, June 28, 1968; and

WHEREAS, the said Edward Boykin, Jr. has filed an application for further stay of the execution pending consideration of a petition for writ of certiorari in these causes by the Supreme Court of the United States.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the execution of the judgments and sentence be stayed pending the disposition of the proceedings in these causes in the Supreme Court of the United States and the further orders of this Court.

IT IS FURTHER ORDERED AND ADJUDGED that this Court hereby retains jurisdiction of these causes for any further or additional orders that may be necessary.

[Clerk's Certificate (Omitted in Printing)]

# SUPREME COURT OF THE UNITED STATES

No. 329 Misc., October Term, 1968

EDWARD BOYKIN, JR., PETITIONER

*v.*

ALABAMA

On petition for writ of Certiorari to the Supreme Court of the State of Alabama.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 642 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 14, 1968

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